AUG 24 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

of the United States

October Term, A. D. 1950

No. 314

FRUEHAUF TRAILER COMPANY, a Corporation,

Appellant,

vs.

HENRY CLAY MYERS,

Respondent.

RESPONDENT'S BRIEF

Upon Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court

of the United States

OCTOBER TERM, A. D. 1950

No. 214

FRUEHAUF TRAILER COMPANY OF CALIFORNIA, doing business in Oregon as Fruehauf Trailer & Equipment Company,

Appellant,

vs.

HENRY CLAY MYERS,

Respondent.

RESPONDENT'S BRIEF

Upon Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Henry Clay Myers, the Respondent, a sheet metal and structural iron worker by trade, was hauling logs at Tillamook County, Oregon in October 1935, using his own equipment (Tr. Vol. I, p. 97). He became dissatisfied with the commercial logging trailer and designed one of his own (Tr. Vol. I, p. 99). Financed by his employer and a

friend, he ordered parts fabricated by the Beall Pipe and Tank Company and built the first trailers in Frisbie's garage in Tillamook (Tr. Vol. II, p. 749) in that year (Tr. Vol. II, p. 839).

While construction was in progress, the Beall Company sent representatives to inspect the trailer and, subsequently, took photographs of it which were, later, in the early part of 1936, used in advertisements for its own trailers (Tr. Vol. II, pp. 756-757). A photograph of one of the trailers, loaded, was exhibited at the Tillamook County Fair and is still on sale, as a picture post card, illustrating the heavy logging industry of the Northwest (Tr. Vol. II, p. 758).

The Beall Company made a contract with the inventor to use his device. It made several trailers. It then reneged on its agreement (Tr. Vol. II, pp. 960, 961) but continued to use the invention, and its trailers, made subsequently, were held to be infringements in the case of Myers vs. Beall Pipe and Tank Co. (Ore. Dist. Ct.), 36 Fed. Sup. 752. No appeal was taken from this decision.

Subsequently the patent was again sustained in the case of Myers vs. Page & Page Company (Ore. Dist. Ct.), opinion not reported. Its validity and infringement by the Page & Page Company was sustained by the United States Court of Appeals, Page and Page etc. vs. Myers, 155 Fed. (2nd) 57. The novelty and utility of the invention have now been conceded by practically all of those in the trailer manufacturing industry (Tr. Vol. II, pp. 837, 838; Vol. I, p. 37; Vol. I, pp. 54, 55).

At the trial in the present case petitioner relied chiefly upon anticipation, as exemplified by the so-called Shuey and Clark trailers (Tr. Vol. I). Since no question is raised as to the finding of non-anticipation, with respect to these trailers, it may be assumed that petitioner has accepted the finding as conclusive.

Indeed petitioner conceded at the bar upon oral argument, in the U. S. Court of Appeals, that all claims of the patent in suit are valid (Tr. Vol. IV, p. 1416). The only issue, of the seven presented in the trial court, which petitioner asks this court to decide for a third time is that of infringement.

This is a question of fact and it has been determined adversely to petitioner by the concurrent findings of the lower courts. This Court has repeatedly held that it will accept such concurrent findings on questions of fact but petitioner urges that exception should be made in this case because, from its point of view, the lower courts, relying upon equivalents, decided the question wrong.

In its petition, petitioner has omitted a concise statement of the grounds for its petition for certiorari but the basis may be gathered from its argument in the petition and in its brief.

It appears there that petitioner asks this Court to inquire into the evidence, adduced in a 1420 page transcript, to re-determine the question of infringement, on these grounds:

1. Public importance of the questions presented (Petitioner's Petition, p. 13).

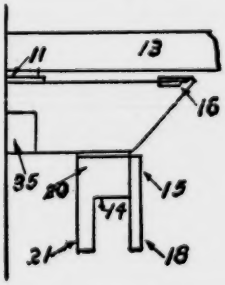
2. Industry affected is chiefly located in the one Circuit so that litigation in other Circuits resulting in conflict of decision is not likely to occur (Petitioner's Brief, p. 23).

3. The District Court and Court of Appeals have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision (Petitioner's Petition, p. 20).

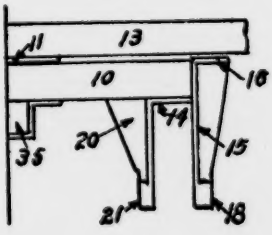
Respondent respectfully submits that the showing on these points is insufficient to warrant this Court in rehearing the cause and the Petition should be denied.

On the merits, Petitioner goes back of the findings of the lower Courts, to the testimony of its own expert witness and isolated portions of other testimony in the trial Court, in an effort to show that the finding of infringement was in error. The substance of its complaint is that its trailers are like the 1935 pilot model of the Myers trailer, in that the outer leg of the straddle mount is attached to the cross bar, on which rests the rub plate, instead of extending, like the drawing in the patent specifications, along the end of the cross bar to the rub plate. It says the lower courts so far departed from their duty, as to require supervision of this Court, when they held that A in the drawing is the same thing structurally and functionally as B.

A.



B.



It will be observed that in the case of B, the outer leg is welded or bolted to the end of the cross bar so that in effect it becomes a part of it. A is copied from the illustration of the "Fruehauf Third Construction" which is reproduced in the appendix to Petitioner's Brief. B is taken from the drawing in Respondent's patent, also reproduced in the appendix of Petitioner's Brief.

Petitioner says the patent claims cover B but not A and seeks support for the statement in the arguments: 1. That its trailers do not have the outer leg of each frame extending above the top of the cross member to form rub plates. 2. That Myers withdrew a claim of his patent application to which the Courts have given effect by construction; and 3. That Myers did not cover his own pilot 1935 model in his claims and thereby donated the invention therein disclosed to the public and Petitioner. Respondent will show that none of these arguments are valid.

SUMMARY OF ARGUMENT

I.

No Basis for Redetermination of Infringement.

Tennessee Iron & R. R. Co. vs. Muscola Local 123, 321 U.S. 590; 64 Sup. Ct. 698; 88 L. Ed. 949.

II.

Public Importance Plea Fails.

Graver Tank & Manufacturing Co., Inc. vs. Linde Air Products Co., 339 U.S. 605; 70 Sup. Ct. 854; 94 L. Ed. 767.

Hawkinson Co. vs. Dennis et al (CCA5) 166 F (2) 61, 62.

III.

Location of Logging Industry.

Exhibits Supply Co. vs. Ace Patents Corporation, 315 U.S. 126; 62 Sup. Ct. 513; 86 L. Ed. 736.

World Almanac, 1950, p. 658.

IV.

Findings Based on Facts and the Law.

Sanitary Refrigerator Co. vs. Winters, et al., 280 U.S. 30; 50 Sup. Ct. 9; 74 L. Ed. 147.

V.

Petitioner's Trailers Embody Patented Combination.

Winans vs. Denmead (1853), 15 How. 330; 14 L. Ed. 717.

VI.

No Patent on Straddle Mount.

VII.

Myers 1935 Trailer Covered by Claims.

ARGUMENT

No Basis for Redetermination of Infringement

Petitioner has begun his argument under the heading "Summary Statement of Matter Involved" and has made

statements which are not borne out by the record, as a basis for an exception to the rule that this Court will accept the concurrent findings of the lower Courts on questions of fact.

In paragraph No. 2, on page 2, of his Petition, he says:

> "There is no dispute about the facts respecting the patent and trailer construction it describes and claims, or about the facts respecting the construction of Petitioner's trailers which have been held to infringe the patent, or about the fact that the patent fails to show, describe or claim Petitioner's structures."

The trial lasted about three weeks and, as shown by the 1420 page record, Petitioner disputed every word of the claims of the patent and every detail of construction and function of Respondent's invention and its own trailers. The finding of infringement was that Plaintiff's patent *does* show, describe and claim Petitioner's structures.

In the following paragraph, Petitioner says:

> "The Court's below have found infringement by applying the doctrine of equivalents in the face of uncontroverted evidence which under the decisions of this Court precludes the application of that doctrine to find Petitioner's trailer structures an infringement of the patent."

The trial Court, on this subject (Tr. Vol. I, p. 51), said:

> "Notwithstanding the argumentative character of the line drawings of defendant's exhibits, which are placed in the back of the brief, and which have heretofore been explained, if they be compared with Figure 3. of the Myers patent, it will be seen that all

> of the essential elements of one device are included in the other, notwithstanding the altered forms of the Fruehauf devices, which to the court's mind, are simply for the purpose of confusion."

Since the basis for an exception to the seasoned and wise rule, that the Supreme Court will accept the concurrent findings of the lower Courts on questions of fact, Tennessee Iron & R. R. Co. vs. Muscola Local No. 123, 321 U.S. 590; 64 Sup Ct. 698; 88 L. Ed. 949, is based upon arguments contradicted by the record, the exception is not applicable.

Public Importance Plea Fails

Petitioner in its brief insists the Court should take jurisdiction, nevertheless, because of the public importance, not of the findings in the case at bar, but the "plain implications" of the case of Graver Tank & Manufacturing Co., Inc. vs. Linde Air Products Co., 339 U.S. 605; 70 S. Ct. 854; 94 L. Ed. 767, which require "immediate clarification."

The Graver case was decided May 29, 1950, nineteen days after Petitioner's request for a rehearing in the Circuit Court was denied. The Courts below, therefore, could not have been influenced by that decision, except insofar as it states the law theretofore applied. Moreover, counsel says that case is distinguished from the case at bar in that the equivalent in the former case was found in the specifications. If this is true, it appears the case at bar is clearly outside the holding in Graver vs. Linde, supra, and this ground for certiorari fails.

The public, it may be observed, has as much interest in maintaining an incentive to invention and preventing the piracy by large corporations of its fruits as in requiring full disclosure in claims. The real interest in this case is a $75,000 supersedas bond (Tr. Vol. I, p. 73) in the lower Court from which Petitioner will have to pay for the unlawful appropriation of a device, four years after its development and two years after it was officially disclosed, in reliance on patent protection, to the public—a device unanticipated by any previous structure and which Petitioner, with all its facilities for research and engineering talent, was unable to produce until a metal worker and logger built one to meet the needs of his trade.

The solicitude of Petitioner in this case for the public interest and, on that ground, seeking a third trial of its infringement of Respondent's patent, is worthy of the comment by Judge Hutcheson in Hawkinson Co. v. Dennis, et al. (C.C.A. 5), 166 F. 2d 61, at page 62:

> "In short, the case as we have it is one in which the defendants, by the device of presenting themselves as defenders of the public interest, draw attention from the less savory role assigned them by plaintiff as infringers pirating plaintiff's invention. This role of invoking the public interest, 'that is the interest of others than the parties', to enable the defendant to keep the fruits of his contract without standing to his bargain, became so familiar in ordinary contract cases that the courts have latterly been quite slow to follow such interested leading."

It may be observed that when the plea of public importance is supported by criticism of this Court for its decision in an unrelated case, rather than by any error in

the case at bar, it may be subject to even more severe condemnation.

Location of Logging Industry

In support of its plea that this Court take jurisdiction, Petitioner offers, also, an affidavit of its engineer, F. Vernon Bistrom, who was its chief witness in the lower court, which says that "substantially the entire market for dual axle logging trailers and the use thereof is within the states of Washington, Oregon, California, Montana, Idaho, Nevada and Arizona." and "substantially all of the manufacturing of dual axle logging trailers is carried on in the state of California, Oregon and Washington."

It will be observed that concentration of the industry in one Circuit is a ground for review of concurrent findings only when coupled with questions of paramount public importance, Exhibits Supply Co. vs. Ace Patents Corporation, 315 U.S. 126, 62 Sup. Ct. 513; 86 L. Ed. 736, which are not present in the case at bar.

It may be conceded that a great deal of the heavy logging of the United States is conducted in the 9th Circuit. Timber production, however, is carried on in all states. The seven states in the 9th Circuit produce only 15 million feet, or three-sevenths, of the total of 35 million (World Almanac 1950 p. 658).

It will be observed from the affidavit that the Petitioner is a subsidiary of the Fruehauf Trailer Company, a Michigan Corporation and its counsel have offices in that state and Washington, D. C.

It will be noted also that Respondent is not a large corporation but a sheet metal worker and logger, which suggests there may be a reason, other than concentration of the industry, for restricting suits for infringement to the Circuit and District in which he resides.

It is respectfully submitted that the showing of concentration of the industry in one Circuit, coupled with paramount public interest of the question involved, is insufficient to warrant granting Petitioner a third trial of the question of infringement when others less able to ask for it are limited to two.

Findings Based on Facts and the Law

Petitioner's third ground for asking a retrial of the question of infringement is that the lower Courts have so far departed from the accepted and usual course of proceedings, in failing to apply the law to the facts, as to call for the exercise of this Court's power of supervision.

Petitioner cites no misconduct on the part of the judges, except that they did not find the facts as he presents them and did not accept his theory as to the applicable law. In his petition for a rehearing, Petitioner indicated its lack of faith in its own position by asking a rehearing before all of the judges of the Ninth Circuit (Tr. Vol. IV, p. 1419).

The fallacy of Petitioner's argument that the Courts failed to apply the applicable law is that it is based upon what it terms "uncontroverted facts", by which it means, apparently, selected portions of the testimony of its own

expert witness and illustrations, which show its theory, but which have been termed argumentative (Tr. Vol. I, p. 51). The witness, indeed, was not consistent and actually supported, in other portions of his testimony, as will be shown, the findings to which Petitioner takes exception, and its drawings clearly show infringement.

In the trial Court, Petitioner attempted to make some point of the order of assembly and means of joining the parts together (Tr. Vol. II, pp. 611, 612) but here, inconsistently, he complains that the trial court regarded the combination as one invention, instead of a collection of parts.

On page 10 he says:

> "The District Court has treated the patent as though it disclosed and claimed a trailer frame in which a cross member, forked frame members and rub plates were a single casting."

Actually the trial Court rejected the single casting theory (Tr. Vol. II, p. 611) and held that the test was whether the device, after assembly, contained the same parts in the same arrangement, operating in the same way (Tr. Vol. I, p. 52). The law on this subject was succintly reviewed by this Court in Sanitary Refrigerator Company v. Winters et al., 280 U.S. 30; 50 Sup. Ct. 9; 74 L. Ed. 147, cited by Petitioner, at page 41 as follows:

> "There is substantial identity, constituting infringement, where a device is a copy of the thing described by the patentee, "either without variation, or with such variations as are consistent with its being in substance the same thing." Burr v. Duryee, 1 Wall, 531, 573.

"Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and, generally speaking, one device is an infringement of another "if it performs substantially the same function in substantially the same way to obtain the same result. * * * Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape." Machine Co. v. Murphy, 97 U.S. 126, 137. That mere colorable departures from the patented device do not avoid infringement, see McCormic v. Talcott, 20 How. 402, 405.

"A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. Ives v. Hamilton, 92 U.S. 426, 430."

Petitioner's Trailers Embody Patented Combination

In this Court Petitioner contends its trailers do not have "the outer frame extending above the top of said cross member to form rub plates." This language is from Claim 1 of the patent. Claim 2 specifies "the outer side of said fork extending upwardly beyond the top of said cross member, said outer side having the top and out turned to form rub plates." Claim 3 requires "rubbing plates forming extensions of the outer side of said forks projecting upwardly and outwardly from the end of said bar", and Claim 4, "the outer side of each frame extending above the top of the cross member to form rub plates." In Claim 3 the "bar" from which the rub plates project upwardly and outwardly is the bar connecting the upper ends of the forks.

The concurrent findings of the lower Courts is that Petitioner's trailers do have this element and the fact seems apparent from inspection of the drawings in Petitioner's brief.

Petitioner's trailers do have rub plates and its own witness, Mr. Bistrom under cross examination, admitted that the rub plates on Petitioner's trailers were upward and outward of the straddle mount and the cross member (Tr. Vol. II, p. 661).

> Q. (Mr. Greene) It (the rub plate) is very definitely outside the bracket, isn't it?
>
> A. (Mr. Bistrom) Very definitely. We have stated that several times in my testimony here.
>
> Q. And the wear (rub) plate is very definitely upward from the bracket, isn't it?
>
> A. That is very obvious.

Counsel for Petitioner also conceded the point (Tr. Vol. II, pp. 611, 612).

The only words of the claims that could be questioned, therefore, is whether so situated the outer leg could be said to "form" rub plates or the rub plates to "form" extensions of the lower frame. The answer should be found in philology rather than jurisprudence. The word "form" means to "fashion", "mould", "take shape", "become solid", "make up", "provide", "amount to". If Petitioner's elements, therefore, make up, provide, or amount to an extension, as described in the claims, there can be no question but that they form such extensions and it is not necessary to invoke the doctrine of equivalents to find infringement.

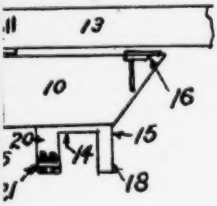
In the drawings in Petitioner's brief, it will be seen that the rub plates are in the same position, with reference to the outer leg or frame, of the patented and infringing devices. The lower courts found that, structurally and functionally, the two devices were the same thing and that the differences were merely colorable (Tr. 53).

Since the question of whether this determination was correct depends upon the facts, it would be necessary to review all the evidence from which the lower Courts found that Petitioner's trailers embody the elements in the combination described in plaintiff's patent, performing the same functions and producing the same results (Tr. Vol. I, p. 63). If this is true, there is infringement. Winans vs. Denmead (1853), 15 How. 330; 14 L. Ed. 717.

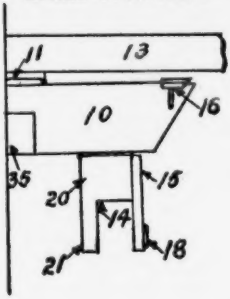
On the following pages, we have shown the chief infringing devices, as reproduced in Petitioner's brief, and the two types of Myers' trailers covered by the claims and specifications, also reproduced in Petitioner's brief; each marked with reference numbers to show that the claims read on each of them.

Alike in Design—Functionally Identical

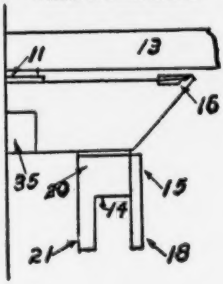
FRUEHAUF 117-118
First Construction



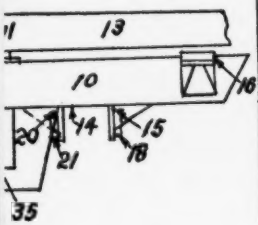
FRUEHAUF 119-120-121
Second Construction



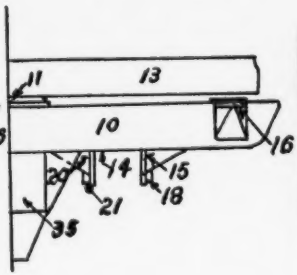
FRUEHAUF 122 B-13, B-14
Third Construction



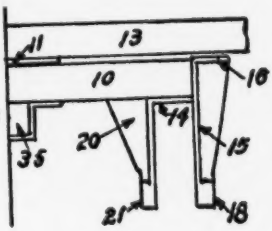
FRUEHAUF 122, 122a
Fourth Construction



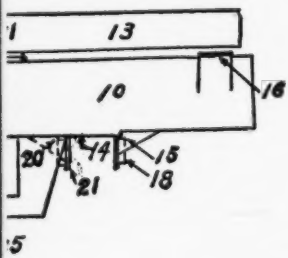
FRUEHAUF 122, 122a
Fifth Construction



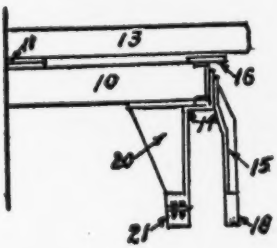
MYERS 1937



FRUEHAUF 122B-12
Sixth Construction



MYERS 1935



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Claims Cover Fruehauf Trailers

1. In a trailer, the combination of a cross member (10) adapted to be connected to a reach (35), a down-turned extending forked frame (14, 15, 20) at each end of said cross member (10), the outer side of each frame (15) extending above the top of said cross member (10) to form rub plates (16) and wheel uniting springs (27) rotatably mounted between the forked ends (18, 21) of said frame (14, 15, 20).

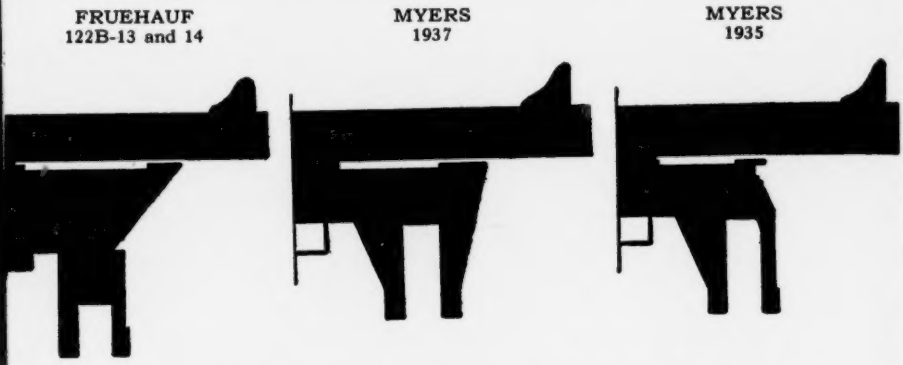
2. A spring mounting for a dual axle trailer consisting of a forked arm (15, 20) having a head (14) connecting the upper ends of the fork and having a cross member (10) attached to said head (14), the outer side of said fork (15) extending upwardly beyond the top side of said cross member (10), said outer side having the top end out-turned to form a rubbing plate (16), the lower end of said fork (18, 21) having a spring (27) pivotally mounted therein between its ends and means for mounting a road engaging wheel at each end of said spring.

3. In a device of the class described, a pair of down-turned fork members (15, 20) having a horizontal bar (10) between the upper ends thereof, means for attaching a reach (35) to said bar (10), rubbing plates (16) forming extensions of the outer side of said forks (15), projecting upwardly and outwardly from the end of said bar (10), and means (18, 21) for pivotally mounting a pair of dual axles on the lower ends of said forks (15, 20).

4. In a trailer, the combination of a cross member (10) adapted to be connected to a reach (35), an integral down turned forked frame (15, 20) at each end of said cross member (10), the outer side of each frame extending above the top of the cross member (10) to form rub plates (16), a bolster (13) pivotally mounted on said cross frame (10) and supported by said rub plates (16) and spring mounted ground engaging elements connected to said forked members (15, 20).

It will be observed that the differences are in proportion, form and order of assembly. The patented combination in the Fruehauf and Myers 1935 trailer are welded, riveted or bolted together whereas the drawing in the patent shows it in one piece. The specifications in the patent point out, however, that the parts may be welded, riveted or bolted together without departing from the principle of the invention (Tr. Vol. III, p. 1116).

The similarity of the patented and infringing trailers is even more striking when the points where the parts are joined are eliminated.



In this illustration, the drawings are made from the exhibits reproduced in Petitioner's brief. It will be observed that, while there are differences in shape, the principle is the same and, in all cases, the rub plates make up, provide, amount to, or form extensions of the outer leg or frame of the patented device.

In its brief, Petitioner claims a functional difference in that rub plates on its trailers do not carry the load *directly* to the outer side of the spring. This argument

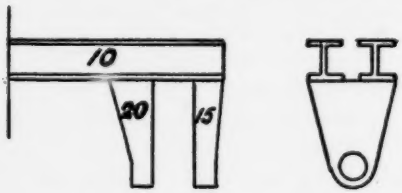
might have some weight if the patent claims required that weight be transmitted *directly*. They require only the use of named elements, in a specially described arrangement, and since Petitioner's trailers meet this requirement it follows that the essential function of the rub plates, kingpin and plate and straddle mount are the same and the result is accomplished by identical means. Its rub plates form, provide or amount to extensions of the frame when the elements are assembled, and there is no need for invoking the doctrine of equivalents to find infringement.

No Patent on Straddle Mount

Respondent's original patent application contained four claims, the first of which was withdrawn, and another one substituted, upon the patent examiner's objection that it had been anticipated by De Bou, Linn and La Gache, to whom Petitioner refers in its brief.

This claim calls only for a straddle mount, which is mentioned also in the record as a bracket and downturned fork. The claim (Tr. Vol. III, p. 1117) said:

A trailer consisting of a cross member (10) having a downturned fork at each end thereof (20-15) each of said forks having pivotally attached to its lowermost ends a pivot bolt, each of said pivot bolts having rotatably mounted therein a spring, each of said springs having mounted at each end thereof a ground engaging wheel."



This claim describes only some of the elements of the combination. It does not call for rub plates so positioned as to carry the thrust and weight of heavy logs, thrown on the outer ends of the bolster, to the outside of the springs, which is the essence of Myers' invention.

Since the original Claim 1 was withdrawn, Myers has never claimed to be the inventor of a straddle mount. It was used on Jefferson's wheel barrow, bicycles and wagons long ago as well as in other patented devices, such as those of De Bou, Linn and La Gache, and in the Clark and Shuey trailers. The straddle mount is merely one element of the Myers combination.

Petitioner knows this is true and its argument, based on the theory that it is false, can only be for the purpose of confusion. At pages 557, 558, Tr. Vol. II, occurred this colloquy:

> The Court: Well, I am a little at a loss to detect what this is about. I am very frank to say I don't see—I have known that there are all kinds of straddle mounts and trunnion saddle suspensions in the prior art, but what is the immediate connection that is going to be attempted to be shown here or suggested?
>
> Mr. Dickey: Why, just this, your Honor, that it is our position in this mater that the straddle mount in our trailers is the same and operate the same with respect to transmission of load as the straddle mounts which have been in conventional type trailers previously, and I am showing in the record here that there were prior to this patent a number of instances of straddle mounting of the frame of trailers on trunnions supported on the springs between tandem axles in tandem-axle trailers.

The Court: Well, there never was any doubt about it, was there?

Mr. Dickey: Well, I didn't think so.

The Court: I don't think so now.

Mr. Dickey: But I have the problem, of course, of getting it in my record in the case.

Since Myers' disclaimer of the invention of the straddle mount was so conceded and recognized why did counsel want evidence of it in the record? It can serve no purpose except to confuse the issues.

The patented device requires the straddle mount to be used with a cross bar, swinging bunk or bolster, rub plates and other elements. The Court did not give Myers a monopoly on the straddle mount by construction. If it had, it would have been required to find the patent anticipated by De Bou, Linn and La Gache, and, possibly, Clark and Shuey. No trailer of Petitioner's, without these additional elements, was held to infringe. Indeed, one was held not to infringe because it had no swinging bolster and no rub plates (Tr. Vol. I, p. 50; Vol. III, p. 1237). The trailers, held to infringe, used all the elements of the allowed claims in the required arrangement and were found to be structurally and functionally identical to the patented device. It wasn't necessary to add anything to the claims by construction to have them cover Petitioner's trailers.

Myers 1935 Trailer Is Covered by Claims

Petitioner, in its brief, in an effort to justify the pirating of Myers' invention, naively implies that Respondent

made it a gift by failing to cover his 1935 trailer, the first exemplification of his device, in his claims.

On page 4, he says Myers "knowingly refrained from including or suggesting his prior 1935 construction in his application for patent." Petitioner says the only claim which covered this device was the original No. 1 which was withdrawn. This 1935 trailer, it says, has the same element missing as the Fruehauf trailers, an outer leg extending upward and outward to form rub plates. If the claims do cover the 1935 Myers trailer, therefore, they cover also Petitioner's trailers.

It has been shown that the original Claim 1 covers only a straddle mount. Myers' 1935 trailer has this element, it is true, but it is in combination with other elements required by the claims allowed. It will be observed that the 1935 trailer differs from the patent drawing in two respects. 1. It is a different shape; and 2. The outer leg is bolted or welded to the end of the cross bar on which are affixed the rub plates, whereas the patent drawing shows all the elements cast into one piece. It is necessary to refer to the drawing in the patent to find this difference. The claims read on the 1935 trailer. The claims do not specify how the parts are put together and the specifications say they may be welded, bolted or riveted (Tr. 1116).

Petitioner's implication is that the 1935 trailer was different in principle from the device described in the 1937 application. Myers said it was an improvement but embodied the same principle (Tr. Vol. II, p. 849). Inspection of the exhibit confirms this statement and the lower

Courts so found.

The statement that Mr. Myers "knowingly refrained from including or suggesting" his 1935 trailer in his patent application is contradicted by the testimony and the only support for it in the record is counsel's frequent repetition of the statement. A typical example is found in the transcript, Vol. II, p. 922:

> Q. (Mr. Dickey) Now, you failed to include in your patent application any description or drawings of the trailer which you say you built in 1935 with the outside leg? A. (Mr. Myers) I believe the claims cover it.
>
> Q. No, I am talking about the drawings and the description of what is shown in the drawings.
>
> A. Well, I left that to the patent attorney.
>
> Q. And the thing that you presented to the patent attorney for filing your application was that sketch Exhibit 147; that is right, isn't it?
>
> A. That was—I do not believe that was what I took to him. I took drawings similar to that plus sketches I made of the 1935 trailer, over the life of what I had developed along, and—
>
> Q. In any case, the design of that 1935 trailer did not get into your patent application?
>
> A. We only entered one drawing, and that was the last one that I had worked up in it and so he used that, apparently, and he said that the rest of it was covered.

Petitioner, on page 27 of its brief, says Myers' idea of projecting the outer leg of a straddle mount up under the rub plate did not appear until after the Myers sketch dated March 20, 1937 (Exhibit 147, Tr. Vol. III, pp.

1373-75). That sketch, however, was drawn from a design made in March 1936 (Tr. Vol. III, p. 1375) to illustrate the principle of the 1935 trailer which had been produced in that year and advertised by Beall Pipe and Tank Co. in the following year. Mr. Myers testified to that effect (Tr. Vol. II, p. 913) and there was no evidence to the contrary. Petitioner's admission that no prior art showed the invention thus described relates to its first disclosure. Certainly, the notarization of the sketch for the protection of the inventor, after his difficulties with the first commercial user and before he filed his patent application, belies any idea he had abandoned the invention therein disclosed.

By inspection, testimony in the record and the findings of the two lower Courts, it is shown that 1935 trailer is covered by the claims and there is no warrant for the appropriation by Petitioner of the discovery on the theory that Myers intended to make the corporation a gift of his invention.

CONCLUSION

This case involves a combination patent for an ingenious arrangement of supports for the bolster of a logging trailer which revolutionized the industry. It permitted reduction of weight of materials, increased loading capacity and gave greater stability. The device appears simple now but there is nothing like it in the prior art developed in a highly competitive industry. The value and utility of the patent has been sustained by the concurrent findings of the lower courts and recognized by practically all trailer manufacturers, including Petitioner, who has used it on its trailers since 1939.

Petitioner concedes the validity of the patent and that the idea embodied therein did not appear in the art until it was disclosed by Mr. Myers. Its own trailers admittedly incorporate the principle exemplified in Myers 1935 trailer but Petitioner contends that differences in form and order of assembly from the structure illustrated in the patent specifications, entitle it to use the invention without paying for it. It contends Mr. Myers abandoned the 1935 form by failing to put a picture of it in his patent application. Petitioner argues that the 1935 trailer, and its trailers, are outside the claims because the connection between two of the elements is indirect, and seeks to read into the claims a requirement that such connection be direct.

This is not like the usual case involving equivalents. Petitioner has not substituted a spring for a leg, one chemical for another, a pin "embedded" for one "carried by", paper for cloth in a lining, metal for cork, in a stamping machine. We would first have to assume that the claims require a direct connection, which is not true, before deciding whether an indirect connection is an allowable substitute.

The difference involved here is in the form and order of assembly of the parts, which when put together, constitute the identical device described in the claims. The Court, with an obvious infringement before it, is asked to go back to the shop and see how it was made to permit Respondent to continue using the invention without paying for it. The test of structural and functional identity with the device described in the claims is more properly

applied after the parts are cast, welded, riveted or bolted together.

We have pointed out that the showing made by Petitioner of the public importance of its infringement of Respondent's patent and the concentration of industry in one Circuit is insufficient to warrant a third trial in the Supreme Court. We have shown also that findings of the lower Courts are based on the law and evidence that no error appears which would justify departure from the general rule that concurrent findings will be accepted.

Respondent therefore, prays the court to deny the Petition for Certiorari or, in the alternative, to affirm the judgment of the lower court and allow him his costs incurred herein.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 214

FRUEHAUF TRAILER COMPANY OF CALIFORNIA,
doing business in Oregon as Fruehauf Trailer
& Equipment Company,
Petitioner,
vs.
HENRY CLAY MYERS,
Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

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